In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 949

JOHN PATRICK DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1969. The petition for a writ of certiorari was filed on December 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether evidence as to the alteration of a vehicle identification plate, to which no objection was made at trial, was properly received.

2. Whether, in a non-jury trial, the trial judge applied an improper standard because he said in reviewing the evidence that petitioner knew or "should have known" that the vehicle which he transported in interstate commerce had been stolen.

STATEMENT

After a non-jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of a violation of the Dyer Act (18 U.S.C. 2312). On April 14, 1969, he was sentenced to four years' imprisonment.

The evidence showed that between May 19 and May 25, 1968, a 1966 Buick sedan was stolen from a street in Brooklyn, New York. The last four digits of the identification number of this vehicle were 8561 (1 R. 7-9).[1] On August 26, 1968, petitioner, a resident of New Jersey, attempted to sell a similar vehicle, but with the last four digits of its number reading 8564, to a used car dealer in High Point, North Carolina (1 R. 20, 25, 37, 62). Petitioner at that time claimed to be named Dixon. The vehicle had been registered in New York to a man named Dixon, but had New Jersey license plates (1 R. 18-20).

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[1] "R." preceded by the volume number refers to the two-volume trial transcript, which we are lodging with the Clerk of this Court.

Upon noticing this discrepancy, the High Point used car dealer called the area F.B.I. agent, one Fairchild (1 R. 22).

After full warnings (1 R. 31-33, 53, 58-59), petitioner told agent Fairchild that he had bought the car two years earlier in New York. He showed the New York registration made out in the name of Dixon, as well as the New Jersey driver's license in the same name (1 R. 34-35). Petitioner gave the agent permission to search the car, telling him he could "take the car apart" and that it was not a stolen car (1 R. 36; 2 R. 255).

While he waited for the agent to examine the vehicle, petitioner took some medicine and appeared nervous (1 R. 58; 2 R. 257). Shortly after the search was concluded, petitioner left the local garage, where the inspection had occurred, in the Buick. He was later stopped for reckless driving by the local police. At that time he showed his own driver's license in the name of Dunn, but a vehicle registration in the name of Dixon. He was then arrested and held overnight in the local jail (1 R. 43; 2 R. 260-262).[2]

Some time after the examination of the vehicle at the garage (1 R. 55), agent Fairchild removed the identification plate containing the vehicle's serial number and forwarded it for expert examination

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[2] There is no evidence of any collusion between agent Fairchild and the local police (1 R. 49-50, 56; 2 R. 260). Prior to the local arrest, petitioner and agent Fairchild had agreed to meet the following morning for further investigation of the circumstances surrounding his possession of the vehicle (1 R. 42, 48, 55-56).

(1 R. 37, 39). This examination revealed that the last digit of the number had been changed from a "1" to a "4" (1 R. 63). There was no objection to the admission of this serial plate (Government Exhibit 5), nor to the expert evidence concerning its alteration (1 R. 37, 40, 62-64).

At trial, petitioner testified that he had no idea that the Buick automobile was a stolen vehicle. He stated that he had never seen the Buick before it had been entrusted to him by some unknown and unseen individual who had given him instructions to drive it to High Point, North Carolina, where car auctions were held (1 R. 222, 2 R. 281, 289, 298).[3]

The trial court in finding petitioner guilty stated that he attached little credence to petitioner's version of events (2 R. 347-348). In the course of his remarks the court said that he thought petitioner

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[3] Petitioner and one of his sons contended that petitioner's trip to High Point was the result of threats made against petitioner because of his cooperation with the New Jersey police which resulted in the arrest of one Bryant for car theft (1 R. 124, 127, 133, 137, 222; 2 R. 281-283). However, no connection between Bryant and the interstate transportation of the stolen Buick was otherwise shown. Indeed, the New Jersey license plates on the Buick, at the time that petitioner attempted to sell it, were plates that had been issued to petitioner's son for another Buick, one which had been "burned" on May 28, 1968 (1 R. 173; 2 R. 290). Petitioner quotes part of police officer Smith's testimony that he, a New Jersey police officer (2 R. 317), would not have been surprised if Bryant's associates might have threatened petitioner (Pet. 10). He omits, however, Smith's next assertion that he did not think such threats "might be likely" (2 R. 323). Bryant, in petitioner's presence, admitted to officer Smith that he sold the Buick vehicle to petitioner, but claimed it was not a stolen car (2 R. 318-319).

was a pawn in the hands of others but that "there are many things to me that indicate that Mr. Dunn knew or he certainly should have known that this car was a stolen car" (2 R. 347). The court then mentioned various factors which led to his conclusion, and said (2 R. 348): "I do think and I feel that this evidence shows beyond any doubt that this charge is true."

ARGUMENT

1. As petitioner acknowledges, the issue of the legality of the removal of the vehicle identification plate from the Buick, after petitioner had been arrested by the local authorities, was not raised at trial (Pet. 7, 14). Absent plain error, he should not be permitted to raise this issue and thereby shift his theory of defense on appeal. Rule 30, F. R. Crim. P., requires timely objection as a prerequisite for a later claim of error. See, *e.g.*, *Singer* v. *United States*, 380 U.S. 24, 38. Normally, the failure to object at trial constitutes waiver and precludes appellate consideration of such a matter. *E.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362; *United States* v. *Indiviglio*, 352 F. 2d 276, 279 (C.A. 2), certiorari denied, 383 U.S. 907; *Bond* v. *United States*, 397 F. 2d 162 (C.A. 10), certiorari denied, 393 U.S. 1035.

In the instant case, moreover, the failure to raise the Fourth Amendment issue was deliberate. Petitioner and one of his sons attempted at trial to convince the court of petitioner's honest ignorance of the stolen character of the Buick which petitioner transported to North Carolina. Both testified that they

were cooperating with the police in an effort to recover stolen cars that they had unwittingly bought from Bryant and thereafter sold (1 R. 69-74, 78-81, 187-210). As the defense counsel stated, "our whole defense is based upon a chain of circumstances which placed [petitioner] in the situation which he felt it necessary to come to North Carolina" (1 R. 74). Thus, the defense theory at trial was that the alteration of the identification plate was a surprise to the petitioner, in accord with his August 26 assertions to agent Fairchild that the vehicle was not stolen (2 R. 255). Petitioner is a college graduate (1 R. 33) and his counsel was deemed by the trial court to be a very competent attorney (1 R. 203; 2 R. 238). When counsel and an accused adopt consistent strategy, their strategy is binding even though "their plans backfired." *Henry* v. *Mississippi*, 379 U.S. 443, 451; *Pope* v. *Swenson*, 395 F. 2d 321, 325 (C.A. 8). Accordingly, the present attack on the defense counsel at trial (Pet. 14) and the effort to raise a new issue are both unwarranted. It is therefore unnecessary to consider whether petitioner's initial invitation to agent Fairchild to "take the car apart" authorized removal of the identification plate for ease in testing, or whether the court below correctly concluded that "[i]n the reception of seized evidence [there was] no deprivation of Fourth Amendment rights" (Pet. App. 22).

2. When the trial judge's remarks are read as a whole it is evident that the court was not using an improper standard in determining the existence of guilty knowledge on petitioner's part, despite its

statement that petitioner "knew or * * * should have known" that the car transported was stolen. In proving scienter, circumstantial evidence must ordinarily be relied upon and a court may conclude that the government met its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to perceive. *United States* v. *Benjamin*, 328 F. 2d 854, 862 (C.A. 2), certiorari denied, 377 U.S. 953; cf. *Spurr* v. *United States*, 174 U.S. 728, 735. Moreover, the court went on to say that the evidence showed "beyond any doubt" that the charge was true (2 R. 348), and the evidence amply supported this finding, as the court below properly determined (Pet. App. 22).[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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JANUARY 1970.

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[4] As the court of appeals succinctly stated, "The out of context inaccuracy of the phrase * * * is overcome by the district judge's other statements showing that he did not try the case under misapprehension of [the applicable] law" (Pet. App. 22).

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